DOCKET

SHOW PROCEEDINGS AND ORDERS DATE: [05/03/89]

CASE NBR: [88105804] CFY STATUS: [ ]
SHORT TITLE: [Paulino, Francisco]
VERSUS [United States] DATE DOCKETED: [103188]
PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Oct 31 1988		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Dec 2 1988		Brief of respondent United States in opposition filed.
Dec 8 1988		DISTRIBUTED. January 6, 1989
Dec 8 1988		Reply brief of petitioner Francisco Paulino filed.
Jan 5 1989		Further response requested on the merits of case. Due Feb. 6, 1989 (BRW)
Feb 7 1989		Order extending time to file response to petition until March 8, 1989.
Mar 8 1989		Brief of respondent United States in opposition filed.
Mar 16 1989		REDISTRIBUTED. March 31, 1989
Apr 3 1989		REDISTRIBUTED. April 14, 1989
Apr 17 1989		REDISTRIBUTED. April 21, 1989
Apr 24 1989		REDISTRIBUTED. April 28, 1989
May 1 1989		Petition DENIED. Dissenting opinion by Justice White

Last page of docket

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PAGE: [02]

DATE	NOTE	PROCEEDINGS & ORDERS
May 1 1989		Petition DENIED. Dissenting opinion by Justice White with whom Justice Brennan joins. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

No. 88- 88-5804

IN THE SUPREME COURT OF THE UNITED
OCTOBER TERM, 1988

FRANCISCO PAULINO,

Petitioner,

- v. -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 88-

IN THE SUPREME COURT OF THE UNITED
OCTOBER TERM, 1988

FRANCISCO PAULINO,

Petitioner,

- v. -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

QUESTION PRESENTED

Whether the Second Circuit's conclusion that because petitioner lacked standing to contest a search of an automobile in which he was a passenger, he lacked standing to contest the seizure of his property, is in conflict with this Court's decision in Rakas v. Illinois, 439 U.S. 128 (1978) and other established precedent.

TABLE OF CONTENTS

TABLE OF CASES

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioner, Francisco Paulino, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit that reversed an order of the United States District Court for the Southern District of New York that granted petitioner's motion to suppress counterfeit money.

OPINION BELOW

The Court of Appeals rendered an opinion on June 23, 1988, which is officially reported at 850 F.2d 93. A copy of the opinion is annexed as Appendix C.

On September 2, 1988, the Court of Appeals denied rehearing, with a dissent by Judge Lumbard, and denied rehearing en banc. A copy of the order is annexed as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on June 23, 1988. A copy of the judgment is annexed as Appendix B.

No application has been filed for an extension of time in which to file this petition.

The court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

U.S. Const. Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Paulino was charged in a one-count indictment with possessing counterfeit United States currency, in violation of 18 U.S.C. § 472. Paulino filed a motion to suppress. At the hearing, the following undisputed facts were elicited:

THE VEHICLE

On the evening of August 27, 1987, New York City Police Officer Joseph Erbetta and his partner were in a police car patrolling the Washington Heights section of Manhattan. At approximately 10:00 p.m., Erbetta encountered a car double-parked in the vicinity of 173rd Street and Fort Washington Avenue.

Erbetta became suspicious when he saw the double-parked car and drove his patrol car up parallel to it. Erbetta asked the driver, later identified as Jose Diaz, why he was double-parked. Diaz replied that he was "hanging out". Erbetta then asked Diaz -- the owner of the car -- for his license, registration and proof of insurance. With Diaz in the car were Benjamin Ortiz, who was in the front seat, and Paulino who was alone in the back seat.

After Erbetta asked Diaz for the documents, he observed Paulino bend over as if to place an object on the floor of the car. Erbetta could not see Paulino's hands or any object.

Erbetta became concerned about his safety and ordered all three occupants out of the car. Using his flashlight, Erbetta searched the front driver's compartment, looking under the mats and then the back. When Officer Erbetta lifted the rubber mat in the rear floor, he saw a packet of bills. Erbetta immediately realized it was not a weapon.

THE BILLS

Erbetta became suspicious of Paulino when he denied that the packet of bills was his and the other occupants also denied

that it was theirs. Armed with no other information, Erbetta seized and searched the bills. He picked up the packet, removed a rubber band, and unfolded the bills. Erbetta then examined the bills closely and noticed that they all had the same serial numbers. Concluding that the bills were counterfeit, Erbetta placed Paulino under arrest. Erbetta acknowledged that he had no reason to know that the bills were contraband until after he examined them. Paulino contended at the hearing both that he knew the money was counterfeit and that the money was his property.

THE SUPPRESSION RULING

In an oral opinion, the district court granted Paulino's motion to suppress upon the following conclusions of law: (1) Police Officer Erbetta had reasonable cause to examine the automobile's interior after seeing Paulino's motion that might signal the presence of a weapon; (2) the money was not in plain view and the officer's lifting of the mat and searching required probable cause; (3) Paulino's placement of the bills under the mat created a place where he enjoyed a reasonable expectation of privacy that gave him standing to object to the search; (4) there was no probable cause under the circumstances for the police to search under the mat; and (5) there was no probable cause under the circumstances for the police to seize and search the bills.[1]

THE COURT OF APPEALS DECISION

The Court of Appeals reversed the district court's order granting suppression. With respect to Paulino's claim that the search of the automobile violated his Fourth Amendment rights, the court concluded that Paulino did not have standing to contest the search of the automobile because he did not have a reasonable expectation of privacy in the space searched. United States v. Paulino, supra, 850 F.2d at 97. The panel then turned to

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[1] In its decision, the Court of Appeals failed to mention that one of the district court's conclusions of law was that there was no probable cause for the police to seize and search the bills.

Paulino's separate claim that the seizure and search of the bills was unreasonable. Citing Arizona v. Hicks, 480 U.S. 321 (1987), the panel agreed that the seizure and search of the bills was unreasonable because there was no probable cause to suspect that the bills were contraband. Id. at 98. However, after analyzing Paulino's two Fourth Amendment claims separately, the court concluded that Paulino's lack of standing to contest the search of the automobile was dispositive of the separate issue of his standing to contest the seizure and search of the bills. Id. at 98.

REASONS FOR GRANTING THE WRIT

The Court of Appeals erroneously failed to distinguish Paulino's privacy interest in the automobile, which was relevant to his standing to contest the search of the automobile, from his privacy interest in the bills, which was relevant to and established his standing to contest the seizure and search of the bills. The court's mistaken view that Paulino's lack of standing to contest the search of the automobile barred him from contesting the seizure and search of his property is in conflict with this Court's decision in Rakas v. Illinois, 439 U.S. 128 (1978) and other established precedent.

In Rakas, the Court held that Rakas and others had no standing merely as car passengers to contest the search of their friend's automobile. However, as the concurring opinion emphasized, petitioners did not claim anything more than that there had been an illegal search of the space of the automobile. Unlike here, they did not claim some other Fourth Amendment violation, i.e., that there had been an illegal seizure of their persons or of property of theirs that happened to be in the automobile. Unlike Paulino, they had no separate basis to challenge the seizure of their property because the property was obviously contraband -- a sawed-off rifle and shells.

The question before the Rakas Court was "a narrow one: Did

the search of their friend's automobile after they had left it violate any Fourth Amendment right of the petitioners." Rakas v. Illinois, 439 U.S. at 150-151 (Powell, J. concurring). This would indicate, as two thirds of the court (the two concurring justices and the four dissenters) recognized, that a passenger does have standing to object to police conduct which intrudes upon his Fourth Amendment protection against unreasonable seizures. Indeed, the Court recognized that while a casual visitor to a house might not have standing to contest a search of the house, he would have standing to contest a seizure of his property. Id. at 142 n.11. In other words, separate Fourth Amendment violations require separate standing determinations. If the taking and searching of a car passenger's property is unreasonable in a Fourth Amendment sense, he has standing to object to the constitutional violation.

This proposition finds further support in United States v. Lisk, 522 F.2d 228 (7th Cir. 1975), cert. denied, 423 U.S. 1021 (1976). Lisk placed contraband in the trunk of a friend's car. The police searched the car and discovered the contraband. The court, in an opinion by Judge (now Justice) Stevens, held that Lisk did not have standing to contest the search of the automobile. However, the court concluded that Lisk's possessory interest in the contraband gave him standing to contest the seizure and search of the contraband. Id. at 233-234. As both Rakas and Lisk demonstrate, Paulino's possessory interest in the bills gave him standing to contest the seizure and search of the bills even if his lack of a possessory interest in the automobile did not give him standing to contest the search of the automobile.

Although the Court of Appeals understood that there were two separate Fourth Amendment claims involved in this case, it failed to realize that separate Fourth Amendment violations require separate standing determinations. The court correctly found that the seizure and search of the bills was unreasonable

because it was not supported by probable cause. This result was mandated by this Court's decision in Arizona v. Hicks, supra, 480 U.S. 321. In Hicks, the Court held that an item found during the course of a lawful search may not be seized unless the police have probable cause to believe that it is contraband. Here, Officer Erbetta admitted that he had no reason to suspect the bills were contraband until after he seized and scrutinized them.

However, after correctly concluding that this seizure was unreasonable, the Court of Appeals erroneously denied Paulino relief on the basis of its determination that he lacked standing with respect to the search of the automobile. Instead, as Rakas and Lisk indicate, the court should have held that, because of his ownership of the bills, Paulino had standing to contest the seizure and search of the bills. The court's decision to the contrary deprives a defendant in the Second Circuit of the right to challenge an unreasonable seizure of his property merely because he happens to place it in another's car. Such a result was never intended by this Court in Rakas and conflicts with established law. Accordingly, this Court should grant certiorari.

CONCLUSION

For the above-stated reasons the writ should be granted.

Respectfully submitted,

Dated: New York, New York
October 31, 1988

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Attorney for Petitioner PAULINO.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 2nd day of September one thousand nine hundred and eighty-eight,

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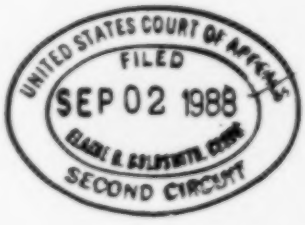
UNITED STATES OF AMERICA,

Appellant,

v

FRANCISCO PAULINO,

Defendant-Appellee.



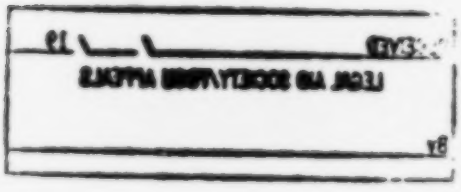
Docket No. 87-1533

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-Appellee Francisco Paulino,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED. Judge Lumbard dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.



Elaine B. Goldsmith
Clerk

United States Court of Appeals
FOR THE
SECOND CIRCUIT

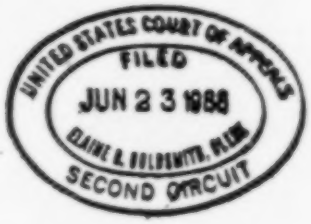
SDNY
87 CR 705
STANTON

MANDATE

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of June one thousand nine hundred and eighty-eight

Present:

HON. J. EDWARD LUMBARD,
HON. RICHARD J. CARDAMONE, CIRCUIT JUDGES,
HON. PETER K. LEISURE, DISTRICT JUDGE*



UNITED STATES OF AMERICA,

Appellant,

-v.-

FRANCISO PAULINO,

Defendant-Appellee.

DOCKET NO. 87-1533

Appeal from the United States District Court for the SOUTHERN District of NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the SOUTHERN District of NEW YORK, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is Reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court.

A TRUE COPY
ELAINE B. GOLDSMITH, Clerk
By Kathleen Brown
Deputy Clerk

Elaine B. Goldsmith,
Clerk
by: Edward J. Guardaro
Deputy Clerk

* Judge Peter K. Leisure, United States District Judge for the Southern District of New York, sitting by designation.

ISSUED AS MANDATE: 9-9-88

necessary to itemize all the other laws to which purchasing groups remain subject. H.R.Rep. No. 865, 99th Cong., 2d Sess. 19, *reprinted in* 1986 U.S.Code Cong. & Admin.News at 5816.

Our conclusion is thus supported by carefully drafted statutory language and a legislative history demonstrating virtually beyond cavil that Congress meant what it said. State of Penn may be correct that the RRA's preemption provisions are so narrow that Congress's general goal of increasing the availability of liability insurance to purchasing groups will be only partly achieved. Congress, however, selected particularized means to that end in conscious recognition that a considerable area of state regulation would remain intact. We have no power to second-guess Congress's decision that the benefits of an arguably more efficient market for insurance are outweighed by the potential costs in diminished state authority.

Affirmed.

UNITED STATES of America, Appellant,

v.

Francisco PAULINO, Defendant-Appellee.

No. 833, Docket 87-1532.

United States Court of Appeals, Second Circuit.

Argued Feb. 10, 1988.

Decided June 22, 1988.

Government appealed from an order of the United States District Court for the Southern District of New York, Louis L. Stanton, J., suppressing counterfeit money on ground that it was seized in violation of defendant's Fourth Amendment rights. The Court of Appeals, Cardamone, Circuit Judge, held that defendant, as a backseat passenger of an automobile which had been stopped in a high-crime area, had no reasonable expectation of privacy in area under rubber mat on rear floor of automobile, and thus seizure of counterfeit money found under mat did not violate his Fourth Amendment rights.

Reversed and remanded.

1. Searches and Seizures ⇐26

Inquiry whether an expectation of privacy exists raises two separate questions: person challenging search must demonstrate a subjective desire to keep his or her effects private; and individual's subjective expectation must be one that society accepts as reasonable. U.S.C.A. Const. Amend. 4.

2. Searches and Seizures ⇐61

Backseat passenger of automobile stopped in high-crime area had no reasonable expectation of privacy in area under rubber mat on rear of floor; although passenger put counterfeit bills under the mat, and put his feet on top of the mat, thus evidencing a desire to keep items under the mat private, he had only known driver for one week and, as a passenger, had no right to exclude others from the automobile. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⇐65

Search of area under rubber mat on rear floor of automobile was not a violation of backseat passenger's Fourth Amendment rights, even though search and seizure of counterfeit bills found under mat was unjustified because not supported by probable cause, since passenger failed to carry burden of demonstrating that he had a reasonable expectation of privacy in area searched. U.S.C.A. Const.Amend. 4.

Paul G. Gardephe, Asst. U.S. Atty., New York City (Rudolph W. Giuliani, U.S. Atty. for the S.D.N.Y., John F. Savarese, Asst. U.S. Atty., New York City, of counsel), for appellant.

Robert E. Precht, New York City (The Legal Aid Society Federal Defender Services Unit, New York City, of counsel), for defendant-appellee.

Before LUMBARD and CARDAMONE, Circuit Judges, and LEISURE, District Judge.*

CARDAMONE, Circuit Judge:

The sole issue presented on this appeal is whether counterfeit currency discovered during a warrantless protective search of a vehicle should be suppressed. The scope of the automobile exception to the Fourth Amendment sheds light on the answer to that question. Unlike what Sir Edward Coke said about a man's house, a man's automobile is not his castle. Castles are not readily moveable or subject to inspection and regulation, and their occupants do not ordinarily pose a threat to the safety of police officers acting in the normal course of their duty. The lowered expectation of privacy in an automobile provides a backdrop for our conclusion that the passenger lacked a reasonable expectation of privacy in that portion of the automobile searched.

I

On a drizzly, foggy August night in 1987 two New York City Police officers in a prowl car were patrolling the Washington Heights section of Manhattan when they came upon a car double-parked on 178rd Street near Fort Washington Avenue, a neighborhood plagued by a high incidence of drug-trafficking and robberies. Pulling alongside the vehicle, Police Officer Erbetta, riding with Officer Kennedy, asked the driver—later identified as Jose Diaz, the owner—what he was doing there. Upon receiving the noncommittal response, "hanging out," Diaz was asked to produce his license, registration, and insurance card. Two passengers were seated in the car—one in front, and the defendant, Francisco Paulino, alone in the rear behind the driver. As Officer Erbetta was requesting proof of ownership, he observed Paulino in the back seat moving his torso and bending over as if placing an object on the floor. It was dark out and the officer was unable to see Paulino's hands or the object. As Officer Erbetta later discovered defendant had been holding a doubled-over packet of 21 counterfeit $50 federal reserve notes, plus a few other bills. Paulino placed the bills under an opaque rubber mat on the floor of the back seat and put his feet on the mat.

Seeing Paulino's furtive movement, the officer ordered all three occupants out of the car and, using his flashlight, searched it. He searched the front, looking under the floor mats, and then the back. When Officer Erbetta lifted the rubber mat on the rear floor, he saw the packet of bills, picked them up, observed that they had identical serial numbers, and concluded that they were counterfeit. At the time, Paulino denied that the packet belonged to him, as did his two companions. Paulino was then placed under arrest.

Later, he was charged in a one-count indictment with possessing counterfeit United States currency in violation of 18 U.S.C. § 472 (1982). At a hearing on defendant's motion to suppress, held on December 8, 1987 in the United States District Court for the Southern District of New York (Stanton, J.), the district court concluded that the search which uncovered the counterfeit money and its seizure by the police was unreasonable. Paulino contended at the hearing both that he knew the money was counterfeit and that the money was his property. In an oral opinion delivered at the conclusion of the suppression hearing, the district judge found the above recited facts and granted defendant's motion to suppress the evidence upon the following conclusions of law: (1) Police Officer Erbetta had reasonable cause to examine the automobile's interior after seeing defendant's motion that might signal the presence of a weapon; (2) the money was not in plain view and the officer's moving to the mat and searching required probable cause; (3) Paulino's placement of the bills under the mat created a place where he enjoyed a reasonable expectation of privacy that gave him standing to object to the search; and (4) there was no probable cause under the circumstances for the police to search under the mat. The United States appealed pursuant to 18 U.S.C. § 3731 (Supp. IV 1986). We reverse.

* Honorable Peter K. Leisure, United States District Judge for the Southern District of New York, sitting by designation.

II

The question before us is whether the district court correctly concluded that Paulino had created a place where he enjoyed a reasonable expectation of privacy by placing the packet of counterfeit bills under the rubber mat on the back seat floor. Recognizing such a reasonable expectation of privacy, Judge Stanton found that the money was not in plain view and therefore the lifting of the rubber mat and the search under it required probable cause. Even though we agree substantially with the district court's analysis of the search itself, we are unable to adopt its conclusion granting suppression of the counterfeit money. We reverse because Paulino had no reasonable expectation of privacy in the area of Diaz's vehicle that was searched.

Normally, a determination by a district court as to whether an act, or belief, or in this case, an expectation, is "reasonable" is a conclusion of law subject to plenary review. *See United States v. Shakur*, 817 F.2d 189, 196 (2d Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 128, 98 L.Ed.2d 85 (1987); *United States v. Caballos*, 812 F.2d 42, 46–47 (2d Cir.1987). The district court made explicit findings of fact, not challenged by either party, which appear to be exclusively in favor of appellee. We undertake plenary review of this case in light of the undisputed facts.

A. Automobile Exception in Fourth Amendment Analysis

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...." The cornerstone of current Fourth Amendment analysis is *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The Supreme Court there repeated " 'that the mandate of the [Fourth] Amendment requires adherence to judicial processes,' and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Id.* at 356, 88 S.Ct. at 514 (brackets in original) (citations omitted) (quoting *United States v. Jeffers*, 342 U.S. 48, 51, 72 S.Ct. 93, 96, 96 L.Ed. 59 (1951)).

One of these exceptions is the so-called automobile exception. Over 60 years ago the Supreme Court recognized an exception to the Fourth Amendment's warrant requirement in the case of an automobile possibly carrying contraband, reasoning that a warrantless search of such a vehicle is not necessarily an "unreasonable" search because the vehicle is so quickly moveable. *Carroll v. United States*, 267 U.S. 132, 153, 45 S.Ct. 280, 285, 69 L.Ed. 543 (1925). Later, a second rationale developed to distinguish motor vehicles from homes based on the lesser expectation of privacy in an automobile, which is normally used for transportation and not for the purpose of storing individual belongings. *Cardwell v. Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (an automobile "seldom serves as one's residence or as the repository of personal effects.").

More recently, in *California v. Carney*, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), the Court relied upon both of these rationales in upholding a warrantless search of a motor home. The first justification for the Court's holding hinged on the vehicle's mobility "in a setting that objectively indicates that the vehicle is being used for transportation." *Id.* at 394, 105 S.Ct. at 2070–71. The second justification was the reduced expectation of privacy in a motor vehicle, based on the fact that much of the automobile is in "plain view" and that automobiles are subject to "pervasive regulation." *Id.* at 391–92, 105 S.Ct. at 2069; *see also South Dakota v. Opperman*, 428 U.S. 364, 367–68, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976) (describing

both lesser privacy prongs); *Cady v. Dombrowski*, 413 U.S. 433, 441–42, 93 S.Ct. 2523, 2528–29, 37 L.Ed.2d 706 (1973) (discussing plain view rationale). These rationales differentiate a home from an automobile for Fourth Amendment purposes; given similar circumstances, a person's expectation of privacy in a car is far less than the expectation of privacy in his home or as the guest in the home of another.

The foregoing discussion of the automobile exception is limited but relevant. It is relevant because it provides the background essential to recognizing that a passenger in an automobile has a lesser expectation of privacy than a guest in another's home. It is limited because this case involves a protective search of an automobile without probable cause, rather than a warrantless search with probable cause. In the latter case, courts applying the automobile exception are concerned only with whether the search involves an automobile, one of its integral parts, or a sufficiently similar vehicle. If the space searched meets this criteria then, provided probable cause exists, the inquiry ends. *See California v. Carney*, 471 U.S. at 394–95, 105 S.Ct. at 2070–71. But, when the search is of a vehicle without probable cause, as here, the automobile exception provides no answer as to whether a defendant has a claim or whether the police actions are justified under the Fourth Amendment.

B. *Paulino's Fourth Amendment Rights*

We turn then to whether Paulino had a reasonable expectation of privacy in the particular automobile in which he was a passenger. The government urges that appellee had no such reasonable expectation and thus lacked standing to challenge the search of Diaz's vehicle. Appellee asserts standing to contest the seizure of what he acknowledged at the suppression hearing was his property.

The Supreme Court has observed that analyzing the question of standing, as a preliminary matter, before reaching the substantive merits of a Fourth Amendment claim complicates rather than aids analysis. *See Rakas v. Illinois*, 439 U.S. 128, 138, 99 S.Ct. 421, 428, 58 L.Ed.2d 387 (1978). Instead, "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Id.* at 139, 99 S.Ct. at 428; *see United States v. Salvucci*, 448 U.S. 83, 87 n. 4, 100 S.Ct. 2547, 2551 n. 4, 65 L.Ed.2d 619 (1980). *Rakas* simply translated the standing inquiry into the threshold question of whether a defendant has a cognizable Fourth Amendment claim. *See United States v. Smith*, 621 F.2d 483, 486 (2d Cir.1980), *cert. denied*, 449 U.S. 1086, 101 S.Ct. 875, 66 L.Ed.2d 812 (1981). For that reason, we focus on Paulino's claim that his own rights under the Fourth Amendment were infringed by the police officer's actions on that August 1987 night.

In discussing his claim, certain propositions of law guide us. When considering a claimed violation of Fourth Amendment rights, the burden is on the defendant to establish that his own rights under the Fourth Amendment were violated. *See Rakas*, 439 U.S. at 134, 138–39, 99 S.Ct. at 428; *United States v. Smith*, 621 F.2d at 486 (Fourth Amendment rights may not be "vicariously asserted"). Further, *Katz* observed that "the Fourth Amendment protects people, not places." 389 U.S. at 351, 88 S.Ct. at 511. From that proposition, the Supreme Court reasoned it is a person's legitimate expectation of privacy in the space invaded that is critical. *See Rawlings v. Kentucky*, 448 U.S. 98, 104–05, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980); *United States v. Rahme*, 813 F.2d 31, 34 (2d Cir.1987); *United States v. Smith*, 621 F.2d at 486. For example, what is knowingly exposed to the public through an open door or window in a home or office is not entitled to Fourth Amendment protection; on the other hand what a person, even in a public place, tries to keep private may be entitled to such protection. *Katz*, 389 U.S. at 351–52, 88 S.Ct. at 511. Moreover, neither ownership of an item nor possession of it—both absent in *Rakas*—is alone sufficient to establish a legitimate expectation of privacy. *Rahme*, 813 F.2d at 34; *see Salvucci*, 448 U.S. at 91–92, 100 S.Ct. at 2552–54. For example, *Katz* held that the petitioner had a legitimate expectation of privacy in a partly enclosed glass telephone booth. 389 U.S. at 352, 88 S.Ct. at 511.

[1, 2] Paulino argues that he had a reasonable expectation of privacy in the area of the vehicle searched. The inquiry of whether such an expectation of privacy exists raises two separate questions. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979); *United States v. Roy*, 734 F.2d 108, 110 (2d Cir. 1984). First, the person challenging the search must demonstrate a subjective desire to keep his or her effects private; and, second, the individual's subjective expectation must be one that society accepts as reasonable. *California v. Greenwood*, — U.S. —, —, 108 S.Ct. 1625, —, 100 L.Ed.2d 30 (1988); *Smith*, 442 U.S. at 740, 99 S.Ct. at 2580. Here, the counterfeit bills were hidden under the rubber mat and Paulino put his feet on it, clearly evidencing his desire to keep these items private. Later, he admitted ownership. We believe, as the district judge apparently did, that Paulino had demonstrated a subjective expectation of privacy at the time of the seizure of his property.

But appellee's claim of privacy founders on the second, objective prong of the inquiry. Although Paulino concededly had a possessory interest in the counterfeit money, that is only one factor considered when determining whether his Fourth Amendment rights have been violated. *See Rawlings*, 448 U.S. at 105–06, 100 S.Ct. at 2561–62. Other factors militate strongly against holding that he had a legitimate expectation of privacy as a passenger in Diaz's automobile. Paulino had only known Diaz for one week. As a passenger he had no right to exclude others from the vehicle. He secreted the counterfeit bills in a hurried and furtive manner while the police were questioning the driver. *See id.* at 104–06, 100 S.Ct. at 2561–62 (no expectation of privacy where petitioner had only known owner of purse for few days, was without right to exclude others from access to it, and where manner in which petitioner stuffed drugs into the owner's purse was precipitous).

Unlike the circumstances in *Katz* and *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) (Jones, apart from a friend who gave him the key to the apartment, had control over the apartment to the exclusion of others), we are unprepared to hold that Paulino's expectation of privacy is one that society willingly accepts as reasonable. To state it another way, Paulino's expectation, viewed objectively, is not justifiable under the circumstances. *See Smith v. Maryland*, 442 U.S. at 740, 99 S.Ct. at 2580.

III

[3] Because the district court made explicit rulings concerning the scope of Paulino's Fourth Amendment claim and both parties misunderstand the limits of the protective search in the instant case, it is necessary to discuss briefly whether Officer Erbetta needed probable cause to lift the mat and search the items he found under it.

The district court concluded that the police officer "had reasonable cause to look into the interior of the car after" observing Paulino's furtive movement that "might signal the presence of a weapon." It follows that the officer acted well within his authority to inquire of the occupants of the car what they were doing in double parking in that particular area, and to conduct a close observation of the occupants. This was a protective search conducted for the personal safety of Officer Erbetta and his partner as well as passersby on the street. In general, "protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect." *Michigan v. Long*, 463 U.S. 1032, 1049, 103 S.Ct. 3469, 3480–81, 77 L.Ed.2d 1201 (1983). Thus, as Judge Stanton held, Officer Erbetta's articulable concern for his safety justified the examination of the interior of the Diaz vehicle.

Yet, the scope of a search must be limited to the purpose that initially authorized

the intrusion. *See Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 1878-79, 20 L.Ed.2d 889 (1968) (search for weapons of a person must be so limited). Similarly, an officer's protective search of an automobile must be "limited to those areas in which a weapon may be placed or hidden...." *Michigan v. Long*, 463 U.S. at 1049, 103 S.Ct. at 3481. At the precise point in the search where justification for the warrantless search ends, any further search must be supported by probable cause. Paulino's furtive movement provided a legal basis for the protective search. It would be anomalous to rule that the officer could not examine that area of the vehicle where the activity which originally justified the protective search occurred. Consequently, it was not an unreasonable search under the Fourth Amendment for Officer Erbetta to lift the rubber mat in the rear of Diaz's auto.

But upon lifting the mat the officer did not discover a weapon. Instead, he saw a packet of money. At this point—absent probable cause—he had no basis to take any further action. *See Arizona v. Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). As *Hicks* makes clear, probable cause is required to move an object for purposes of a search—no matter how seemingly minor is the invasion of an individual's possessory interest—beyond the justified bounds of the lawful search. *Id.* 107 S.Ct. at 1158. Probable cause must exist prior to the extended search, not after its completion. Here there was no probable cause to pick up and examine the bills. Physical inspection of the bills would have been justified on alternative grounds if visual inspection revealed that they were patently counterfeit, i.e., the visible portion of the bills was miscolored or plainly misprinted. Further, if instead of these counterfeit bills, drugs or weapons had been revealed in plain view, they could have been legally searchable and seizable. However, absent either probable cause or self-evident contraband the search and seizure of these bills was unjustified. Nonetheless, even having so concluded, the search is not a violation of Paulino's Fourth Amendment rights since he failed to carry the burden of demonstrating that he had a reasonable expectation of privacy in the area searched.

IV

Accordingly, the order granting suppression is reversed and the matter is remanded to the district court for further proceedings.

Reversed and remanded.

LUMBARD, Circuit Judge, concurring:

The police officers acted reasonably throughout, from their initial questioning of the occupants of the automobile to the seizure of counterfeit money found under the floor mat.

When the officers saw the car double-parked on 173rd Street in Washington Heights, they asked the occupants what they were doing there. The answer of the driver, Jose Diaz, that they were just "hanging out" justified officer Erbetta's request that Diaz produce his license, registration and insurance card. During this exchange with Diaz, Erbetta saw Paulino, the sole occupant of the backseat, bend over as if he were putting something on the floor.

The Washington Heights area is known as a high crime area. Under the circumstances, questioning the occupants of the car necessarily involved some danger to the police and passersby. Thus, it was reasonable for the police to determine whether the occupants had any concealed weapons.

It was a dark, drizzly, and foggy night and in order to find out what might be concealed in the car, Erbetta ordered all three occupants out of the car and searched the front and backseat areas. When Erbetta lifted the rubber mat where Paulino had been sitting, he found a doubled-over packet of twenty-one $50 bills. Under the circumstances, the finding of the packet raised the reasonable suspicion that the bills might be counterfeit. Had the bills been legitimate money, Paulino would hardly have had any purpose in hiding them when the officers approached the car. From a cursory examination, Erbetta could see that the bills were counterfeit.

Consequently, I conclude that Erbetta only performed his clear duty as an officer of the law when he examined the bills in order to confirm or allay his suspicions. The seizure was lawful and should stand. Each step taken by the police led inevitably to the next step. Having every reason to believe that Paulino had hidden something he wanted the police to not know about there was good reason for Erbetta to find out what it was. Having examined the package it was Erbetta's duty to seize the counterfeit money.

Police action at night on a busy public thoroughfare in a high crime area requires the measures which the police took. There are no considerations of public policy which make it advisable for the courts to suppress evidence seized under such circumstances in order to discourage such seizures. *Compare Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). I believe that by any standard the action was reasonable.

For these reasons, I concur in reversing the order of the district court which suppressed the evidence.

STATE OF VERMONT, Conservation Law Foundation of New England, Inc., and Vermont Natural Resources Council, Petitioners,

v.

Lee THOMAS, Administrator, United States Environmental Protection Agency and the United States Environmental Protection Agency, Respondents,

and

Alabama Power Company, et al., Intervenors.

No. 872, Docket 87-4119.

United States Court of Appeals, Second Circuit.

Argued March 7, 1988.

Decided June 23, 1988.

State sought review of final ruling of EPA in taking "no action" on those portions of State's implementation plan addressing regional haze. The Court of Appeals, Altimari, Circuit Judge, held that regulations did not authorize states containing class I areas to implement regional haze measures through federally enforceable state implementation plans, but rather, EPA intended to limit regulations at present to plume blight, and thus, EPA's refusal to approve State's implementation plan in its entirety did not violate EPA's own regulations or Clean Air Act.

Petition denied.

1. Health and Environment ⇐25.15(9)
Statutes ⇐219(6)

In view of EPA's responsibility to administer Clean Air Act, appellate court gives great deference to administrator's interpretation of statute. Clean Air Act, § 101 et seq., as amended, 42 U.S.C.A. § 7401 et seq.

2. Administrative Law and Procedure ⇐763
Health and Environment ⇐25.15(6)

Unless challengers to decision by EPA can demonstrate that agency action is plainly unreasonable, appellate court cannot disturb its ruling.

3. Health and Environment ⇐25.5(4)

The 1980 EPA regulations which anticipated long-term strategies designed to alleviate regional haze did not actually authorize states containing class I areas to implement regional haze measures through federally enforceable state implementation plans, but rather, EPA intended to limit regulations to plume blight, and thus, EPA's refusal to approve State's implementation plan in its entirety did not violate EPA's own regulations or the Clean Air Act. Clean Air Act, § 101 et seq., as amended, 42 U.S.C.A. § 7401 et seq.

4. Health and Environment ⇐25.5(8), 25.15(1)

State which sought EPA action on regional haze which was precluded from

OPPOSITION

BRIEF

ORIGINAL

No. 88-5804

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

FRANCISCO PAULINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-5804

FRANCISCO PAULINO, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order suppressing as evidence counterfeit money that was seized during an automobile search.

On September 14, 1987, petitioner was indicted by a grand jury sitting in the Southern District of New York. He was charged with possession of counterfeit currency, in violation of 18 U.S.C. 472. Petitioner moved to suppress the counterfeit money, which had been seized from a car where he had been riding as a passenger. The money was seized after police officers stopped the car, ordered all three occupants out of the car, and discovered the money under a mat on the floor of the back seat. On December 8, 1987, the district court suppressed the evidence on the ground that the officers could not lawfully search the car without probable cause.

The court of appeals reversed (Pet. App. C). The court held that petitioner, as a backseat passenger in an automobile, had no reasonable expectation of privacy in the area under the rubber mat on the rear floor of the car.

Petitioner contends (Pet. 5-7) that he had standing to contest the search and seizure because of his possessory interest in the counterfeit money, even if he lacked standing to contest the search of the automobile. Whatever the merits of petitioner's contention, it is not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contention will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his current claim to the Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of the final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time. */

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1988

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*/ Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

REPLY BRIEF

ORIGINAL

No. 88-5804

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

FRANCISCO PAULINO,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO THE BRIEF
FOR THE UNITED STATES IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

FRANCISCO PAULINO,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO THE BRIEF
FOR THE UNITED STATES IN OPPOSITION

Petitioner's response is submitted to respond to the statement in the government's brief that the case is not ripe for review by the Court.

The government asserts that the petition should be denied because the court of appeals' decision is interlocutory. While relevant to the Court's assessment of whether review should be granted, the interlocutory nature of a federal court of appeals judgment is not a bar to such review. Where there is an important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status. See Estelle v. Gamble, 429 U.S. 97 (1967); Gillespie v. United States Steel

Corp., 379 U.S. 148 (1964); United States v. General Motors Corp., 323 U.S. 373 (1945).

This case requires immediate review by the Court. The legal issue is an important and clear-cut one: Whether a passenger is disallowed from challenging an unreasonable seizure of his property merely because he happens to place it in another's car. Moreover, the issue is fundamental to the further conduct of the case. If the evidence is not suppressed, there is little likelihood that petitioner would be acquitted following a trial on the merits. To preserve the issue, however, petitioner would have to go through the empty excerise of a trial. A guilty plea would waive the issue. See Menna v. New York, 423 U.S. 61 (1975). The government has stated on the record that it will not permit petitioner to plead guilty on the condition that he be able to raise this issue on appeal. Because of the importance, clarity, and dispositive nature of the issue, in the interests of judicial efficiency, the Court should grant petitioner's application for a writ of certiorari.

CONCLUSION

For these reasons and the reasons urged in the petition for a writ of certiorari, the writ should issue.

Respectfully submitted,

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December 8, 1988

OPPOSITION BRIEF

ORIGINAL

No. 88-5804

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

FRANCISCO PAULINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a passenger in an automobile, has standing to contest the seizure of counterfeit currency that the police found during a search of that automobile.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-5804

FRANCISCO PAULINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C) is reported at 850 F.2d 93.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on June 23, 1988. A petition for rehearing was denied on September 2, 1988. The petition for a writ of certiorari was filed on November 3, 1988.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On the evening of August 27, 1987, two New York City police officers spotted an automobile double-parked in an area marked by a high number of drug deals and robberies. Pulling along side the parked vehicle, Officer Joseph Erbetta asked the driver -- later identified as Jose Diaz -- what he was doing. Diaz replied that he was "hanging out." Officer Erbetta then asked Diaz (who owned the car) for his license, registration, and

[1] On January 9, 1989, this Court asked that we respond on the merits to the petition.

proof of insurance. At that time, Officer Erbetta noticed that petitioner was alone in the rear seat and that another man was seated in the front passenger seat. Pet. App. C94.

As Officer Erbetta was requesting proof of ownership from Diaz, he observed petitioner bend over and appear to place an object on the floor of the car. At that point, Officer Erbetta could see neither petitioner's hands nor the object he was holding. Officer Erbetta became concerned for his safety. He ordered all three occupants out of the car, and then searched the interior of the car. When Officer Erbetta entered the rear passenger area, he lifted a rubber floor mat and observed a packet of $50 bills. Officer Erbetta examined the bills and immediately discovered that they were counterfeit because they bore identical serial numbers. Petitioner was then arrested. Pet. App. C94.

2. A grand jury sitting in the Southern District of New York charged petitioner with possession of counterfeit currency, in violation of 18 U.S.C. 472. After an evidentiary hearing, the district court suppressed evidence of the seized counterfeit bills. The court ruled that Officer Erbetta had reasonable cause to look into the interior of the car after he saw petitioner reach to the floor. The court held, however, that probable cause was required before Officer Erbetta could lift the floor mat and that there was no probable cause for that aspect of the search. Moreover, the court concluded that petitioner had standing to object to the search because he enjoyed a reasonable expectation of privacy in items placed under the floor mat. Pet. App. C94.

3. The court of appeals reversed. The court of appeals agreed with the district court that, in the absence of probable cause, Officer Erbetta was not justified in seizing and inspecting the packet of currency (Pet. App. C98). Nevertheless, the court held that petitioner, a mere passenger in the automobile, did not have standing to object to the search of the automobile or the seizure of the counterfeit currency (id. at C97).

Judge Lumbard concurred. In his view, it was reasonable, not only for the officer to inspect the interior of the automobile, but to seize the packet of currency when it was discovered during the course of that search. Pet. App C98-C99.

ARGUMENT

Petitioner does not contend that the court below erred in holding that, as a mere passenger in an acquaintance's car, he lacked a reasonable expectation of privacy in the interior of that car. Instead, petitioner argues (Pet. 6) that his "possessory interest in the bills gave him standing to contest the seizure of the bills even if his lack of a possessory interest in the automobile did not give him standing to contest the search of the automobile" itself. Petitioner's claim is unpersuasive.

1. It is settled that, in order to challenge a search, a defendant must first show that he had a legitimate expectation of privacy in the area that was searched. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980); United States v. Salvucci, 448 U.S. 83, 93 (1980). Such a showing is necessary because "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." Rakas v. Illinois, 439 U.S. 128, 134 (1978). See United States v. Salvucci, 448 U.S. at 86-87; United States v. Payner, 447 U.S. 727, 733 (1980). Accordingly, a defendant must show "not only that the search * * * was illegal, but also that he had a legitimate expectation of privacy in [the area or item that was searched]." Rawlings v. Kentucky, 448 U.S. at 104. See also Rakas v. Illinois, 439 U.S. at 140, 143.

In Rakas, the defendants were passengers in an automobile that was stopped and searched by the police. In rejecting those defendants' challenge to the seizure of evidence found in the glove compartment and under the passenger seat of the vehicle, the Court noted that mere presence in a vehicle with the owner's

permission "is not determinative of whether * * * [a passenger has] a legitimate expectation of privacy in the particular area of the automobile searched." 439 U.S. at 148. Rather, the Court held that automobile trunks, glove compartments, and space under car seats are areas in which "a passenger qua passenger simply would not normally have a legitimate expectation of privacy." Id. at 148-149. See also United States v. Grandison, 780 F.2d 425, 432 (4th Cir. 1985) (mere passenger lacks "standing" to object to a search of a vehicle or to the seizure of evidence found therein). Accordingly, the court of appeals correctly held that petitioner did not have "a legitimate expectation of privacy as a passenger of Diaz's automobile" (Pet. App. C97).[2]

Contrary to petitioner's claim, a person does not have a legitimate expectation of privacy simply because he has a possessory interest in the item that is seized. This Court has specifically "decline[d] to use possession of a seized good as a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched." United States v. Salvucci, 448 U.S. at 92. Thus, "[t]he person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation" (ibid). See also Rawlings v. Kentucky, supra; United States v. Rahme, 813 F.2d 31, 34 (2d Cir. 1987).

2. Petitioner claims (Pet. 7) that, whether or not he has standing to object to the search of the car, his possessory interest in the counterfeit bills gives him standing to object to the "search" of them -- i.e., Officer Erbetta's inspection of their serial numbers. Assuming, arguendo, that petitioner may legitimately assert a possessory interest in contraband, his reliance on Arizona v. Hicks, 480 U.S. 321 (1987) is misplaced. In that case, police officers legitimately entered the defendant's residence because they believed that a dangerous

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[2] If petitioner wished to preserve his privacy interest in the bills, he could have kept the bills on his person rather than attempt to secret them in a place over which he had no right to exclude third persons.

gunman was present. While in the residence, officers inspected stereo equipment and seized it once they determined that it was stolen. This Court upheld the suppression of evidence concerning the stereo equipment because the inspection of the equipment constituted a search that was a Fourth Amendment intrusion separate from the entry of the residence itself. See 480 U.S. at 324-325. That separate search was not justified by either exigent circumstances or any other exception to the Fourth Amendment's warrant requirement. Id. at 325-329.

The decision in Hicks did not announce new Fourth Amendment standing rules. Hicks had a reasonable expectation of privacy regarding his stereo equipment, not because he had a proprietary interest in that equipment, but because the equipment was located in an area in which Hicks maintained an expectation of privacy. If Hicks had left his stereo equipment in a friend's car, he would have had no more grounds to object to the inspection of the stereo than to object to the search of the car itself. See United States v. Aguirre, 839 F.2d 854, 857 (1st Cir. 1988). Thus, even assuming that the officers here undertook a separate and illegal search in briefly examining the serial numbers on the currency (but see Pet. App. C98-C99), petitioner has no standing to object to that search simply because he claimed that the counterfeit money was his. [3]

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[3] Petitioner also relies (Pet. 6) on United States v. Lisk, 522 F.2d 298 (7th Cir. 1975), cert. denied, 423 U.S. 1021 (1976). Lisk, however, was decided before Rawlings, Salvucci, and Rakas. To the extent that Lisk holds that a proprietary interest in an item may confer Fourth Amendment standing apart from any reasonable privacy expectation, it is contrary to the later decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1989

OPINION

SUPREME COURT OF THE UNITED STATES

FRANCISCO PAULINO *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88-5804. Decided May 1, 1989

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

In August, 1987, two police officers observed a car parked in a high-crime area of New York City. Seated in the front seat of the car was its owner and another occupant; petitioner was in the back seat. The officers approached the car, and began to ask questions of the owner. As they did this, they saw petitioner lean over and appear to place an object on the floor. Fearful that the item might be a weapon, the officers ordered the men out of the car, and searched its interior. The front and back seat areas were searched. When one officer lifted the rear floor mat, he found a packet of currency there. He picked up the packet, removed a rubber band, and examined the bills closely. He observed that all the bills had the same serial number, and concluded that they were counterfeit. Petitioner was arrested, and charged with a counterfeiting offense.

The District Court granted petitioner's motion to suppress the fruits of the search of the packet, but the Second Circuit reversed. 850 F. 2d 93 (1988). The panel majority agreed with petitioner that the officer, upon determining that the item beneath the floor mat was neither a weapon nor plainly contraband, "had no basis to take any further action." 850 F. 2d, at 98. "[A]bsent either probable cause or self-evident contraband the search and seizure of these bills was unjustified," the Court of Appeals concluded. *Ibid.* However, the Second Circuit nonetheless refused to suppress the evidence

so obtained because it found that petitioner lacked a "reasonable expectation of privacy in the area searched." *Ibid.*

As I see it, the decision below was incorrect; it at least merits review here. The Fourth Amendment protects from unreasonable searches not only an individual's home and person, but also his effects. Even granting that petitioner had no "expectation of privacy" in the back seat of the car, he had standing to object to the violation of his Fourth Amendment rights when an admittedly illegal search and seizure of his property was conducted. To conclude otherwise, as the Second Circuit did here, would suggest that when someone lays a sheaf of papers down on a sales counter, or places a stack of documents on the bus seat beside him, or the like, the police may come along, pick up these items, and rifle through them—even if the officers lack probable cause or reasonable suspicion or any basis whatsoever for the search or seizure. None of our precedents reflects such an interpretation of the Fourth Amendment with respect to the right to resist the search and seizure of one's possessions, even when those possessions are in public places.

In its decision below, the Court of Appeals relied on our prior rulings in *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980); *United States* v. *Salvucci*, 448 U. S. 83 (1980); and *Rakas* v. *Illinois*, 439 U. S. 128 (1978). These cases do support the notion that merely having a property right in a seized item does not give one standing to challenge the unlawful search of another person's property to find that item. *Salvucci*, *supra*, at 91; *Rawlings*, *supra*, at 105–106. But this case is different from the cases on which the Second Circuit relied. In those cases, the aggrieved defendants sought to challenge the legality of searches of others' private places, when those searches revealed contraband items belonging to the defendants. In this case, though, the officers opened and examined an item belonging to petitioner which, on its face, offered no justification for such an examination. This case is thus like the one we left open in *Rakas*, *supra*, at 142 n. 11.

We have noted repeatedly in the past that the Fourth Amendment "protects people, not places," *Katz* v. *United States*, 389 U. S. 347, 351 (1967). Just because petitioner's packet was in a place that was not private does not deprive him of a right to resist a search of that packet, anymore than Chadwick was so deprived by his placement of his suitcase in a car which the police had no cause to search. See *United States* v. *Chadwick*, 433 U. S. 1 (1977); *United States* v. *Ross*, 456 U. S. 798, 812–813 (1982). Simply put, the Second Circuit confused petitioner's lack of standing to challenge the search of another's car *for* an item belonging to petitioner, with petitioner's right to challenge the search *of* an item belonging to him that was found within the car.

Nor is the sweep of the ruling below limited by observing that petitioner could have preserved his privacy interest in the packet of bills if he had kept it on his person. Such a view suggests that the officers could not have taken petitioner's wallet from his person and examined its contents but could have searched his briefcase if he had had one on the seat beside him. It also suggests that the police, without a warrant or probable cause, could search and seize a person's briefcase checked in a public checkroom, or his luggage in a hotel lobby, or his personal effects in a public place. In none of these instances would such a person have standing to object to the officer's being where he was, but to say that he may not object to the seizure of his effects is suspect and merits review here. Consequently, I dissent from the Court's denial of review in this case.